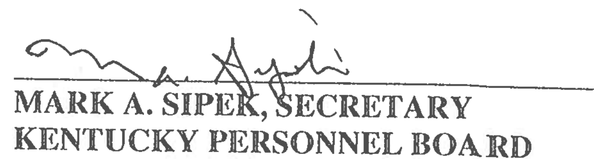
CERTIFICATION OF PERSONNEL BOARD RECORDS

I certify that attached hereto is a true and correct copy of the Findings of Fact, Conclusions of Law and Recommended Order and Final Order in the cases of **ROBIN PARKS (APPEAL NO. 2019-184) and JENNIFER MERKLE (APPEAL NO. 2019-190) V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS** as the same appears of record in the office of the Kentucky Personnel Board.

Witness my hand this 19th day of October, 2022.



MARK A. SIPEK, SECRETARY
KENTUCKY PERSONNEL BOARD

Copy to Secretary, Personnel Cabinet

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

ROBIN PARKS (APPEAL NO. 2019-184)
AND
JENNIFER MERKLE (APPEAL NO. 2019-190) **APPELLANTS**

FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

VS.

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS **APPELLEE**

*** *** *** *** ***

The Board, at its regular October 2022 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 18, 2022, Corrected Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 22, 2022, Appellee's Exceptions and Request to Supplement the Record, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellants' appeals are therefore **SUSTAINED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 19th day of October, 2022.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Callie E. Walton
Hon. Jesse Robbins
Hon. Rosemary Holbrook (Personnel Cabinet)
Rodney Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

ROBIN PARKS (APPEAL NO. 2019-184)

and

JENNIFER MERKLE (APPEAL NO. 2019-190) **APPELLANTS**

V.

CORRECTED
FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS **APPELLEE**

***** ***** ***** ***** ***** *****

This matter came on for an evidentiary hearing on August 26, 2020, and April 6, 2021, at 9:30 a.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Mark A. Sipek Hearing Officer. The proceedings were recorded by audio/video equipment. This hearing was conducted by Amazon Chime teleconferencing.

The Appellants, Robin Parks and Jennifer Merkle, were present and represented by the Hon. Callie Walton. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Erik Carlson-Landy. Also present for the Appellee as Agency representative was Warden Sarah Ferguson.

BACKGROUND

1. The Appellant, Robin Parks, filed Appeal No. 2019-184 on August 28, 2019, from a one (1) - day suspension and her Interim/Annual Employee Performance Evaluation. The Appellant, Jennifer Merkle, filed Appeal 2019-190 on September 9, 2019, from a one (1) - day suspension.

2. The Appellants initially filed their appeals without the benefit of counsel. While their appeals were pending, both Appellants hired the Hon. Callie Walton to represent them in this matter. By agreement of the parties, these two (2) appeals were consolidated.

3. The Appellee filed a Motion to Dismiss Appellant Parks' appeal as to any issues relating to her Interim/Annual Employee Performance Evaluation. Counsel for Appellant Parks filed a response arguing that the Appellant was not appealing the entire evaluation or the score but was appealing references to the Appellant's disciplinary action contained in her evaluation. No ruling was made on the Appellee's Motion to Dismiss.

histories, Warden Ferguson reduced the suspensions to a one (1) - day period for each Appellant (Appellee's Exhibits 4 and 5). Attached to this Order is the suspension letter issued to Parks as **Recommended Order Attachment A** and the suspension letter issued to Merkle as **Recommended Order Attachment B.**

11. In summary, Warden Ferguson testified that she suspended the two (2) Appellants because they failed to stop or report this inmate misconduct. She discussed at length Appellee's Exhibit 8, CPP 14.7. She believed the Appellants had an obligation to stop this conduct and to report it. The Warden testified that what she observed on the tape constituted a sexual offense or sexual contact and required action, according to CPP 14.7. She stated the reporting was supposed to be to the Shift Supervisor, who she described as the captain in charge of security. She stated that the Appellant's reporting this to their immediate supervisor would not constitute an appropriate report under the policy.

12. Warden Ferguson stated any staff members that witness actions of a sexual nature are trained to report them to the Shift Supervisor or the Prison Rape Elimination Act (PREA) Coordinator. She acknowledged that CPP 14.7 only states that a sexual offense should be reported. She stated that training informs employees that the report must be to the Shift Supervisor or the PREA Coordinator. The Warden agreed that LaTawnya Gray was responsible for the Town Hall event and was the Acting Supervisor on May 1, 2019. The Warden testified that a report to a supervisor such as Gray was better than nothing but did not comply with the policy. She also testified that anyone who witnessed the Town Hall skit had a responsibility to stop the performance.

13. The Appellee next called **Jessica Johnson**, a Program Administrator with the DOC, Division of Corrections Training. During her testimony, she introduced training records showing that the Appellants had been trained each year on Kentucky Corrections Policies and Procedures. She stated that if a staff member witnesses any sexual contact or a sexual offense, they are encouraged to report it. She stated that the report should be made to the employee's direct supervisor or the Warden.

14. The Appellee called **Mary Ann Strickland**, the Branch Manager of the Division of Addiction Services. She was the Appellants' second-line supervisor and Nicole Lowry-Hall was their first-line supervisor. Strickland acknowledged that Gray was the Acting Supervisor on May 1, 2019. She testified she was unaware that the Appellants had reported the incident at the Town Hall to anyone. She testified specifically that she saw the Appellants numerous times between May 1 and May 10, 2019, and they did not tell her anything about actions of a sexual nature at the Town Hall. She first learned of the incident following an inmate complaint of a PREA violation. Strickland testified that the Substance Abuse Program could have lost its license over this incident. She described it as an ethical violation. She believed the one (1) - day suspension for the two (2) Appellants was lenient and she would have considered discipline up to and including dismissal. She was not aware that the inmates had been placed on a "unity." Strickland testified that the Appellants should have stopped the incident and reported it to Internal Affairs. Strickland testified there was a PREA investigation into this incident.

20. Gray was responsible for the inmates who put on the skit at the Town Hall. They were part of her unit. Merkle had no idea what the inmates were going to do that day. Merkle stated that the first part of this skit was "ok." The latter part was inappropriate. She stated she was angry about this skit. She denied that she was laughing and clapping or that she stood up and cheered. She stated she was sitting in her chair watching the skit. She estimated that the inappropriate part of this skit lasted about twenty (20) seconds. She also stated that Gray tried to stop the skit, standing up and yelling, "stop, stop." However, the inmates could not hear her and did not stop. The entire skit lasted approximately seven (7) minutes.

21. Merkle stated that she did not witness sexual contact or a sexual offense. She did not believe what she had witnessed was a PREA violation. She thought a report to her first-line supervisor, Gray, was appropriate under the circumstances. She understood that Gray was going to discuss this matter with Nicole Lowry-Hall. Merkle stated that, although the conduct she witnessed was inappropriate, she did not see anything that was not consensual.

22. Merkle testified that, before the May 1, 2019 Town Hall incident, there was a Town Hall event that involved an inappropriate dance by a transgender inmate. Counselors raised the issue that the dance needed to be stopped. Lowry-Hall stated she would discuss this after the Town Hall. Merkle understood that these issues were to be discussed in private afterwards, so that counselors did not lose credibility with the inmates.

23. Merkle believed she should not have been suspended, and that this disciplinary action has hurt her career.

24. Merkle testified she has been a good employee during her career at the Roederer Correctional Complex. She received a highly effective rating on Interim/Annual Employee Performance Evaluations for 2017, 2018, and 2019. (Appellant's Exhibits 8, 9, and 9a.). Merkle asked that references to this matter be removed from her 2019 Interim/Annual Employee Performance Evaluation. These references read as follows:

> "In addition, an incident occurred during this period that compromised the integrity of the program and put our clients and staff at risk."
>
> "An incident occurred on May 1, 2019, that resulted in Ms. Merkle's receipt of a 1-day suspension during this review period. She violated CPP 14.7 by witnessing and not stopping nor reporting an incident that put clients and staff at risk. In response, she was required to attend additional training and as a result, she has shown an increased awareness of her surroundings ad communicates her concerns to her supervisor and unit staff."

25. The Appellant, **Robin Parks,** was the last witness to testify. She is a Social Service Clinician I in the Substance Abuse Program at the Roederer Correctional Complex. She has been employed with the Department of Corrections since 2003, starting in Food Services. She transferred to security when Food Services was privatized. While working for the Appellee, she

Lowry-Hall, was not present and Gray was the Acting Supervisor. (Testimony of Robin Parks, Jennifer Merkle, Mary Ann Strickland, and Warden Sarah Ferguson.)

4. The Town Hall event performed by the inmates included four (4) male inmates wearing wigs who sat in chairs while four (4) other inmates, without wigs, conducted the skit. During the skit, the four (4) inmates wearing wigs drove into the gym in a fake car. They sang songs and took off their shirts while performing a fake striptease. They had t-shirts and vests on after they took their shirts off. In a report of their performance, the four (4) inmates slid across the floor to the inmates sitting in the chairs. They danced around the other inmates while the inmates sitting in the chairs threw fake money at them. (Testimony of Robin Parks, Jennifer Merkle, and Appellee's Exhibits 9 and 10.)

5. During the performance, Gray attempted to stop the inmates, however, they could not hear her because of the music. When the performance was over, the Appellants, along with the other Social Service Clinicians, met and discussed this matter. They decided to handle it internally by telling the inmates their actions were inappropriate and that there would be consequences. They also agreed that Gray would contact their supervisor regarding the incident. (Testimony of Robin Parks, Jennifer Merkle, and Appellant's Exhibits 16, 25, and 26.)

6. The consequences that the Social Service Clinicians applied was referred to as an "unity." The discipline would be registered against the entire group of inmates, and they would not have any future Town Hall events until this issue was resolved. (Testimony of Robin Parks and Jennifer Merkle.)

7. Thereafter, on May 10, 2019, an inmate who observed the Town Hall, filed a complaint regarding the performance, which he deemed to be a potential PREA violation. This allegation was investigated by Internal Affairs Captain Durell St. Clair. Captain St. Clair did not testify in this matter. A redacted version of his report was admitted into evidence. Even with the redactions, the parties were informed that this report would be considered hearsay. (Testimony of Warden Ferguson and Appellee's Exhibit 9.)

8. Relying on the Internal Affairs investigation report and review of the Town Hall videotape, Warden Ferguson issued letters of Intent to Suspend the Appellants for three (3) days. After reviewing the Appellants' employment records and their responses to the letters of Intent to Suspend, Warden Ferguson reduced the three (3) - day suspensions to one (1) - day suspensions. Warden Ferguson found the Appellants failed to stop or report the conduct at the Town Hall by the inmates. The Warden determined that the Appellants violated CPP 14.7. Warden Ferguson determined that the inmate performance during the Town Hall constituted a "sexual offense" and "sexual contact" as those terms were defined in CPP 14.7. She stated that, as a result, the Appellants were required to report this matter to the Shift Supervisor or the PREA Coordinator. (Testimony of Warden Ferguson and Appellee's Exhibits 4, 5, and 8.)

9. On its face, CPP 14.7 only requires that a "sexual offense" must be reported. The Appellants felt they complied with the policy when they reported the matter to Gray and discussed the performance after it was over. The Hearing Officer finds that the Appellants properly reported

4. The one (1) - day suspensions of the Appellants should be set aside. In addition, in order to make the Appellants whole, the four (4) sentences referenced in the Appellants' 2019 Interim/Annual Employee Performance Evaluations, including the references set out in Background paragraph 24 of this Recommended Order, should be removed. KRS 18A.095(22).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **ROBIN PARKS (APPEAL NO. 2019-184) AND JENNIFER MERKLE (APPEAL NO 2019-190) V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, be SUSTAINED**, and the one (1) - day suspensions against the Appellants **SET ASIDE AND EXPUNGED** from their files. The Appellants shall be restored all pay, benefits, and made whole with respect to the restoration of the one (1) - day suspensions. The Appellee shall remove, at a minimum, the four (4) sentences set out in Background paragraph 24 from the Appellants' 2019 Interim/Annual Employee Performance Evaluations. Further, the Appellee shall reimburse the Appellants for any leave time they used in attending the hearing and any pre-hearing conferences. [KRS 18A.105, KRS 18A.095(22) and (25), and 200 KAR 12:030.]

NOTICE OF EXCEPTION AND APPEAL RIGHTS

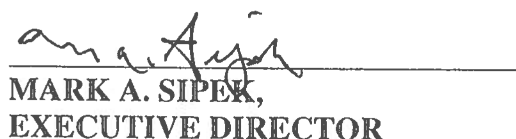
Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within fifteen (15) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Mark A. Sipek** this 22nd day of August 2022.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK,
EXECUTIVE DIRECTOR

Parks, Robin C.
30041623

8.2.19

DEPARTMENT OF CORRECTIONS

Kathleen M Kenney
Commissioner

Roederer Correctional Complex
P.O. Box 69
LaGrange, Kentucky 40031
Telephone: (502) 222-0173
Fax: (502) 225-0084

Jessie Ferguson
Warden

July 17, 2019

Robin Parks
402 McCarty Lane
Campbellsburg, KY 40011

Perner:

Dear Ms. Parks,

On July 5, 2019, you were issued an Intent to suspend letter. You requested to have an interview. After careful consideration of the statements made on your behalf at your Intent to suspend hearing held in my office on July 9, 2019 in the presence of Maryann Strickland Administrative Branch Manager, I have determined that the clear weight of the evidence establishes that you did commit the charges contained in the notice. I have decided to reduce the suspension from a three (3) day suspension to a one (1) day suspension.

Pursuant to 18A.095, you are notified that you are suspended from duty and pay for a period of one (1) working day, effective August 2, 2019. You are to return to work at your regularly scheduled time the following business day.

Based on a review of your performance and based on the authority of KAR 1:345, Sections 1 and 4, there is reason to believe this suspension is justified based on the following specific reason:

Poor Work Performance Violation of CPP 14.7, section II A., C.,G, Violation of RCC IPP 03-01-01 4r., i.e., as reported by Internal Affairs Captain Durrell St. Clair. On May 1 at approximately 9AM, You, Social Service Clinician I Tiffany Davis, Social Service Clinician I Latawnya Gray, Social Service Clinician I Jennifer Merkle, and Administrative Secretary April Geisler were present during the Substance Abuse Program Town Hall meeting held in Unit 5 gym. During the Town Hall meeting, a skit was performed by eight inmates from Wing B4. During the town hall, four male inmates put on wigs, provided by the SAP department, and sat in chairs. While four, other male inmates without wigs conducted the skit. During the skit, the 4 male inmates without wigs drove in the Unit 5 gym in a fake car. They began singing the song "No Scrubs." During the song, the four male inmates took their khaki tops off and threw them into the air. Next, the song, "Pony" came on and the four male inmates slide across the floor to the inmates sitting in the chairs with the wigs on. The male inmates began dancing around other male inmates and thrusting their pelvis towards them while the inmates in the chairs threw fake money at them. Based on witness statements, it was like a "Magic Mike" show. During the entire performance Ms. Davis, Ms. Gray, Ms. Merkle, Ms. Geisler and yourself were all singing along, laughing, and clapping.

Exhibit 4

Recommended Order
Attachment A

Merkle, Jennifer E.
31055548

8.2.19

DEPARTMENT OF CORRECTIONS

Kathleen M Kenney
Commissioner

Roederer Correctional Complex
P.O. Box 69
LaGrange, Kentucky 40031
Telephone: (502) 222-0173
Fax: (502) 225-0084

Jessie Ferguson
Warden

July 17, 2019

Jennifer Merkle
3308 Hidden Springs Ln
Prospect, KY 40059

Perner:

Dear Ms. Merkle,

On July 5, 2019, you were issued an Intent to suspend letter. You requested to make a written statement and have an interview. After careful consideration of the statements made on your behalf at your Intent to suspend hearing held in my office on July 9, 2019 in the presence of Maryann Strickland Administrative Branch Manager, and based on your written statement, I have determined that the clear weight of the evidence establishes that you did commit the charges contained in the notice. I have decided to reduce the suspension from a three (3) day suspension to a one (1) day suspension.

Pursuant to 18A.095, you are notified that you are suspended from duty and pay for a period of one (1) working day, effective August 2, 2019. You are to return to work at your regularly scheduled time the following business day.

Based on a review of your performance and based on the authority of KAR 1:345, Sections 1 and 4, there is reason to believe this suspension is justified based on the following specific reason:

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Exhibit 5

Recommended Order
Attachment B

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD

ROBIN PARKS (APPEAL NO. 2019-184)

AND

JENNIFER MERKLE (APPEAL NO. 2019-190) APPELLANTS

V. INTERIM ORDER

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS APPELLEE

*** *** *** *** ***

These matters are before Hearing Officer Mark A. Sipek for a ruling on the Appellants' Motion for a Directed Decision. Wherefore, with the Hearing Officer having reviewed the file, including the Appellants' Motion for a Directed Decision, the Appellee's response, the Appellants' reply, and being duly advised, **HEREBY ORDERS AS FOLLOWS:**

1. The Appellants', Robin Parks and Jennifer Merkle, Motion for a Directed Decision is **DENIED.**

   a. The Hearing Officer finds that the Appellee has submitted sufficient non-hearsay evidence to carry its burden of proof. The Hearing Officer agrees with the Appellee's analysis of the videotape of the Town Hall, Exhibit 10. The Hearing Officer agrees that the videotape in questions is similar to the security video in Johnson v. Commonwealth, 2013-SC-000787-MR, 2015 WL 363592 (Ky. June 11, 2015). It is the content of the video and the actions on the video which are evidence in this case. Based on the analysis in the *Johnson* case, the Warden's testimony regarding the video is also admissible. The Hearing Officer rejects the Appellants' argument that the inmates' assertions are the key evidence. In this case, the inmates' actions are the key evidence on the video and they are not hearsay.

   b. In addition, the Appellants' admissions in their written statements, which are entered into evidence as Exhibit 3, Exhibit 6 and Exhibit 9, constitute non-hearsay evidence.

2. Because the Appellee has presented sufficient non-hearsay evidence to carry its burden of proof, there are genuine issues of material fact going forward and the Appellants should have an opportunity to put on their case so a full evidentiary record could be made in these matters.

Recommended Order
Attachment C

2015 WL 3635292
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION
THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION. RENDERED: JUNE 11, 2015 NOT TO BE PUBLISHED
Supreme Court of Kentucky.

Joshua C. JOHNSON, Appellant
v.
COMMONWEALTH of Kentucky, Appellee

2013
–
SC
–
000787
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MR
|
JUNE 11, 2015
|
Rehearing Denied September 24, 2015

Synopsis
Background: Defendant and codefendant were convicted in the Boyle Circuit Court, Darren Peckler, J., of burglary and other offenses. Defendant appealed.

Holdings: The Supreme Court held that:

[1] county sheriff who performed investigatory stop of taxi in which defendant and codefendant were riding had probable cause to arrest them;

[2] police officer's testimony concerning a lost surveillance video that he had viewed did not violate the best evidence rule; and

[3] trial court did not abuse its discretion by placing a leg restraint on defendant during trial.

up defendant before proceeding north. U.S. Const. Amend. 4.

[5] **Criminal Law**—Scope and Effect of Objection

Defendant failed to preserve for appellate review any challenge to county sheriff's testimony at trial on burglary and other charges concerning statements made by special deputy, even though defendant's counsel stated his intention to join the trial objections made by codefendant's counsel, and codefendant's counsel did object to the testimony, where defendant's counsel responded to the objection by stating that the judge should "let it in" because "it only helps" the defendant's case.

[6] **Criminal Law**—Admissibility of secondary evidence

Police officer's testimony at trial on burglary and other charges concerning a lost surveillance video that he had viewed did not violate the best evidence rule, pursuant to rule allowing other evidence of the contents of a recording when the originals have been lost or destroyed unless the proponent of the evidence lost or destroyed them in bad faith; store owner's testimony that he had inadvertently lost or recorded over the video established that the originals were lost, and defendant could not establish that Commonwealth lost or destroyed the video in bad faith, since it was never in Commonwealth's possession. Ky. R. Evid. 1002, 1004(1).

[7] **Criminal Law**—Acts or conduct

Police officer's testimony at trial on burglary and other charges concerning a lost surveillance video that he had viewed was not hearsay, where officer did not repeat any statements made by anyone appearing in the video, but rather officer merely described the conduct of the burglars in the video, which was not intended as an assertion. Ky. R. Evid. 801(a).

[8] **Criminal Law**—Use of documentary evidence

Police officer's testimony at trial on burglary and other charges concerning a lost surveillance video that he had viewed did not violate the Confrontation Clause; the conduct of the burglars shown in the video was not a statement, the video itself was not witness testimony, and defendant had the opportunity to cross-examine officer about hi recollection and account of the video. U.S. Const. Amend. 6.

for the defense.

Later that same morning, officers from the Junction City Police Department responded to a call about a burglary at a gas station, also in Boyle County. Some of this burglary was also captured on security footage. This time, police obtained a copy of the video, which showed what appeared to be a black male and a white male, both wearing hooded jackets or sweatshirts, dark pants, and distinctive sneakers. The video also showed the men leaving in what appeared to be a dark-colored sports utility vehicle (SUV). A safe taken from the store was later found abandoned.

Still later that morning, another Boyle County sheriff's deputy responded to a call about a burglary at the Old Bridge Golf Club. Some of this burglary was also captured on surveillance video. Instead of getting a copy of the video, the deputy recorded the playback of the video with his cell phone. Nothing was taken from the club, but damage to the building was estimated to be over $8,000.

This string of burglaries continued in nearby Lincoln County.[2] Based on the various security videos of the burglaries, police suspected that one black male and two white males were responsible for the burglaries. Acting on this information, Sergeant Thacker of the Lincoln County Sheriffs department attempted to pull over a black SUV around 3:45 a.m., but the driver evaded him. The SUV was found abandoned a short time later. After obtaining a search warrant for the SUV, the police found a substantial amount of cash and other items from the burglarized stores. They also found a wallet containing a driver's license for Billy Roach of Indiana, and a photograph of a young boy. The SUV had Indiana license plates, though this information was not disclosed during the subsequent suppression hearing.

*2 Sometime in the late morning or afternoon,[3] Sheriff Curt Folger of the Lincoln County Sheriffs Department received a report that a black male, later identified as Daniel Stovall, was going door to door in northern Lincoln County, about one and a half to two miles from where the SUV had been abandoned, attempting to obtain a ride in various businesses. The sheriff testified at a suppression hearing that he spoke with people he knew in that area and "told them what they were looking for," referring to the black male and two white males who had been seen in the security videos. A short time after this, the sheriff received a call from a friend of his, a "special deputy" named Hal Akers, who stated that he had seen a black male getting picked up by a green taxi on U.S. 27 somewhere between Lancaster and Stanford, and that the taxi was heading south toward Stanford (in Lincoln County). The taxi stopped to pick up another person, who turned out to be Johnson, and headed back north on U.S. 27 toward Garrard County. According to Sheriff Folger, it was "very unusual" for people to hale or be picked up by a taxi in that area.

Sheriff Folger notified Lancaster city police of the taxi. Lancaster police officers found it and began following it, while the sheriff headed north to catch up to them. Shortly after the taxi entered Garrard County, they pulled the taxi over. They found only the taxi driver, Stovall, and Johnson in the taxi.

At the suppression hearing, Sheriff Folger stated that he and the other officers took Johnson and Stovall out of the taxi and "secured them for their safety and ours, too." He then stated the men were taken to his office and the officers "started the investigation."

The sheriff testified that he believed the men were the same men that had been seen in the surveillance video based on their clothes and unique shoes, which included a pair of black sneakers with red markings and white, soles.[4] At the suppression hearing, he stated that the shoes and their markings were especially important in identifying the men.

After taking Johnson and Stovall to the police station, law enforcement officers learned that they were from Indiana, and that the abandoned SUV was registered in Indiana. Sheriff Folger also discovered a photograph in Johnson's wallet that was identical to the one found in the abandoned SUV. Pursuant to a warrant, police fingerprinted the suspects and collected DNA samples. Johnson's fingerprints matched those on a black plastic bag located in the SUV.

Johnson filed a motion to suppress evidence discovered by police after his arrest on the grounds that the police illegally stopped the green taxi and arrested him. This motion was denied by the trial court, and the case proceeded to trial.

*3 At trial, Sheriff Folger testified that Special Deputy Hal Akers had informed him of Stovall going from business to business, entering the green taxi, and picking up Johnson. Sheriff Folger further testified that this information led to the stop

WESTLAW © 2020 Thomson Reuters No claim to original U.S. Government Works

with only the latter being challenged. Any evidence discovered after the stop but before the arrest was properly considered in determining the existence of probable cause to arrest.

[3]Thus, we are left with Johnson's primary argument, namely, that even if the stop were lawful, the ensuing arrest was not. Johnson notes properly that he could be arrested without a warrant only on probable cause that he had committed a felony. He, of course, argues that the evidence available to the police at the time of his arrest fell short of that standard. This Court disagrees.

"To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle,* 540 U.S. 366 (2003) (internal citations omitted); *see also Commonwealth v. Jones,* 217 S.W.3d 190 (Ky.2006). "Probable cause for arrest involves reasonable grounds for the belief that the suspect has committed, is committing, or is about to commit an offense." *McCloud v. Commonwealth,* 286 S.W.3d 780 (Ky 2009).

Although we are treating the challenge to the taxi stop itself as unpreserved, the facts leading up to it are nonetheless relevant in the probable cause-to-arrest analysis. The police knew they were looking for a black male and two white males, and two of those three were seen entering the taxi. Johnson argues that the taxi was only stopped because it contained one black male passenger and one white male passenger, and that no criminal activity was occurring at the time of the stop. But probable cause is determined by looking at the totality of the circumstances. The race of the passengers in the taxi was one of many factors that led police to make the stop and later informed their decision to arrest. *See Hampton v. Commonwealth,* 231 S.W.3d 740 (Ky.2007) (discussing that innocent behavior combined with other circumstances can amount to reasonable suspicion).

[4]What is important is that the stop occurred during an ongoing investigation, with law enforcement in active pursuit of the suspects from a series of felony burglaries that occurred approximately twelve hours earlier. Video surveillance footage showed two white males and one black male burglarizing the stores. An SUV, which had earlier evaded the police, was later discovered abandoned with evidence of the burglary in plain sight. A short distance from the SUV, Special Deputy Akers observed a black male, Stovall, on foot going door to door in a business area on U.S. 27 in search of a ride. Shortly thereafter, the man was seen getting into a taxi, which then proceeded south to pick up Johnson and then turned back north. Sheriff Folger testified that this was an unusual occurrence for the area, and that Special Deputy Akers had proven to be a reliable source for receiving such information.[5]

*5 And, more importantly, after stopping the taxi, Sheriff Folger was able to identify that Johnson and Stovall matched the description of the burglars. Specifically, they were dressed the same as the burglars in the surveillance video and Stovall was wearing the same distinctive shoes that were seen in the video.[6] This evidence was discovered in the course of the short investigative stop and added to the evidence that had at that point given rise to the sheriffs reasonable suspicion that Stovall and Johnson had been involved in the burglaries.

We hold that these facts, viewed in their totality from the perspective of a reasonably objective police officer, established probable cause for Sheriff Folger to believe that Johnson was a participant in the burglaries. Because the stop of the taxi and the subsequent arrest of Johnson were both lawful, all evidence following from the arrest was obtained legally. Thus, we hold that the trial court did not err in denying Johnson's motion to suppress.

B. Johnson waived any claim of error with respect to Sheriff Folger's testimony about Special Deputy Akers' Statements.

Johnson next claims that the trial court erred by permitting Sheriff Folger to testify as to what he had been told by Special Deputy Akers about the two men who turned out to be Johnson and Stovall in their efforts to get a ride in northern Lincoln County. Johnson asserts the trial court committed reversible error by allowing this testimony, as Akers' statements were inadmissible hearsay. Johnson further contends that his right under the Sixth Amendment's Confrontation Clause was violated because he did not have an opportunity to cross-examine Akers.

destroyed the evidence in bad faith before the exception becomes inapplicable. The evidence was lost or destroyed by the store owner, not the Commonwealth or the police. Johnson, therefore, cannot show that the Commonwealth or the police acted in bad faith.

*7 Moreover, any possible prejudice was eliminated because the trial court gave a missing evidence instruction, allowing the jury to infer that the lost video would be favorable to Johnson's case if it were available.

The trial court did not abuse its discretion in allowing Officer Stratton to testify about the contents of the security video.

[7]The next question is whether Officer Stratton's testimony about the video violated the hearsay rules or the Confrontation Clause. But the simple fact is that Officer Stratton's testimony was not hearsay. Hearsay is "(1) [a]n oral or written assertion; or (2)[n]onverbal conduct of a person, if it is intended by the person as an assertion." KRE 801(a). Officer Stratton did not repeat any statements made by anyone appearing in the video, thus his testimony did not convey an oral or written assertion. He did, however, describe the conduct of the burglars in the video. But the burglars' conduct was not intended as an assertion. Thus, Officer Stratton's description of that conduct was not hearsay. *See Davis v. Civil Service Com'n of the City of Philadelphia,* 820 A.2d 874, 879 n. 3 (Pa.Commw.Ct.2003) (holding a surveillance videotape of a store showing defendant stealing was not hearsay "because nonverbal conduct of a person is only hearsay if it is intended by the person as an assertion"); *McDougal v. McCammon,* 455 S.E.2d 788, 794 (W.Va.1995) (holding a surveillance videotape of a plaintiff was not a "statement" and thus was not hearsay).

[8]Johnson's Confrontation Clause claim must fail for similar reasons. The Confrontation Clause is only implicated by out-of-court statements repeated at trial or by live witness testimony. The conduct Officer Stratton described was not a statement. And the video itself was not witness testimony. (For the Confrontation Clause to be implicated, the video itself would be subject to cross-examination—a clearly absurd suggestion.) Johnson had the opportunity to cross-examine Officer Stratton about his recollection and account of the video. That satisfied the requirements of the Confrontation Clause.

D. The trial court did not abuse its discretion in placing leg restraints on Johnson during trial.

[9]Johnson also asserts that the trial court abused its discretion by placing a leg restraint on him during trial. The court allowed the use of a "stiff-leg" restraint, which was not visible to the jury. To justify the use of the restraint, the court stated there was a security concern and that the stiff-leg restraint was the "least restrictive alternative" to handcuffs and shackles.

Criminal Rule 8.28(5) provides that "except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for his physical restraint." While the use of shackles is appropriate in exceptional cases, it is condemned as a general practice, and such restraint shall not be used in the absence of a necessity. *Commonwealth v. Conley,* 959 S.W.2d 77, 77 (Ky.1997). Nevertheless, this Court has held that the decision to place a criminal defendant in shackles even while in the presence of the jury is within the "sound and reasonable discretion" of the trial judge. *Id.* at 78; *Tunget v. Commonwealth,* 198 S.W.2d 785, 786 (Ky.1946). But to reach the decision that shackles are to be used, the trial court must review the entire record for "some good grounds for believing such defendants might attempt to do violence or escape during their trials." *Conley,* 959 S.W.2d at 78.

*8 We cannot say that the trial court's decision to leave Johnson in the restraints was an abuse of discretion in this case. The court justified the restraints with a generic concern about security, which would be insufficient grounds for shackles, manacles, or other forms of visible restraint. Such restraints, when seen by the jury, undermine the presumption of innocence. *E.g., Hill v. Commonwealth,* 125 S.W.3d 221, 233 (Ky.2004). To employ such restraints, a court would be required to make particularized findings about the need for them, and cannot rely on a generic concern for security.

But the law on this subject has been primarily concerned with traditional, *visible* restraints, such as chains and shackles. *See, e.g., Deck v. Missouri,* 544 U.S. 622, 630 (2005) ("*Visible shackling* undermines the presumption of innocence and the related fairness of the fact finding process." (emphasis added)). The restraints employed in this case were apparently invisible to the jury, having been placed under Johnson's pants leg, and the jury was not otherwise on notice that he was in the state's custody. The use of non-visible restraints is not *per se* prejudicial as the prejudice usually comes from their being seen by the

Johnson that the same photo had been found in an abandoned SUV that had been involved in a burglary. Johnson "threw his head down."

5 Though the issue is not preserved, as discussed above, there is no question that these circumstances gave the officer a reasonable suspicion that the men in the taxi had been involved in the burglaries the night before. The proximity in time and space to the burglaries and the abandoned SUV, along with the unusual behavior of Stovall in trying to get a ride and then summoning a taxi that took a southern detour to pick up Johnson, gave rise to more than a mere hunch that these men were associated with the burglaries. When taken together the facts indicate "at least a minimal level of objective justification for the stop." *Bauder*, 299 S.W.3d at 591. Sheriff Folger had a reasonable, articulable suspicion that the occupants of the taxi were responsible for the burglaries, and thus were subject to seizure for violation of the law.

6 The Commonwealth also argues that the photo found in Johnson's wallet further establishes probable cause. That photo, however, was not discovered until after the arrest and is not properly considered in evaluating probable cause in this case.

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